

IN AND FOR THE COUNTY OF KING

Defendants.

[illegible]

No. 12-2-40564-6 KNT

July 8, 2016

Transcribed by: Shanna Barr, CETD

A P P E A R A N C E S

FOR THE PLAINTIFF:

BRADLEY W. ANDERSEN

PHIL J. HABERTHUR

Landerholm, PS

805 Broadway

Suite 1000

P.O. Box 1086

Vancouver, Washington 98666-1086

RICHARD M. STEPHENS

Stephens & Klinge LLP

10900 NE Eighth Street

Suite 1325

Bellevue, Washington 98004

FOR THE DEFENDANTS:

MICHAEL B. TIERNEY

PAUL R. TAYLOR

Tierney & Blakney, PC

2955 80th Avenue Southeast

Suite 102

Mercer Island, Washington 98040

-o0o-

July 8, 2016

THE COURT: Please be seated. Good morning, everyone.

ATTORNEYS: Good morning.

THE COURT: I'd like to go into findings of fact. It seems to me that it's the best place to start. And I read over the proposal by Plaintiffs and the response from the City and then the reply that the plaintiffs submitted, and I must admit -- and I guess I would start with Mr. Tierney and Mr. Taylor.

Whoever of you wants to respond, feel free, but I think that the reply of the plaintiff is right on here. If you had specific problems with specific findings, I would have expected you to have supplied your own. I didn't see that.

The problem with this case from day one has always, in my estimate, been that we've had a number of causes of action that have been combined, I think primarily out of necessity, actually, because of the overlapping evidence that is involved in trying to prove one theory or another theory or another theory. And I ordinarily do not like to have 58 findings, or whatever outrageous amount Mr. Andersen proposed. I don't usually like to have that many. I think it's -- well, I've never had that many, ever, so -- but I don't have a whole lot of choice here because you haven't

1 given me anything in opposition other than a general
2 response, which, quite frankly, I wasn't looking for. So
3 I'd like to know your response to that.

4 MR. TIERNEY: Thank you, Your Honor. What we wanted to
5 point out to the Court was that what we thought was the
6 proposed findings and conclusions had already been presented
7 in the form of the K&S motion. And that's why we put
8 forward in our brief was just use those --

9 THE COURT: Well --

10 MR. TIERNEY: -- that are already in there. And I wanted
11 to get some response from the Court as to what it thought
12 appropriate findings were, because from the ruling the Court
13 made in the motion on the promissory estoppel was based on
14 the findings that were proposed in the motion, and I thought
15 the Court would say, well, that's what I'm going to go with.
16 And I got the plaintiffs' response on that and I thought,
17 well, we've pointed out what we think the findings should
18 be. But, no, we did not pull them out and put them in a
19 separate document, so last night that's what I did. I
20 pulled them out. I put them in a separate document.
21 There -- the findings that were in the motion, it's not the,
22 whatever, 20 pages worth. It's seven pages worth. I can
23 hand that up.

24 THE COURT: Well, I don't have it.

25 MR. TIERNEY: I know. I did it last night, Your Honor.

1 THE COURT: Do they have it?

2 MR. TIERNEY: No. I have it. I just brought it in to the
3 court. I wanted to see what the Court had to say. If you
4 were inclined to --

5 THE COURT: I'm inclined to enter separate findings,
6 because I do think that although the damages are
7 undifferentiated, and it's pretty clear -- and in my order,
8 my last order awarding the plaintiff promissory estoppel or
9 granting their motion on promissory estoppel my conclusion
10 was that the damages that the jury awarded were
11 undifferentiated, and therefore I'm not going to separate
12 what is promissory estoppel and what is a takings claim,
13 essentially. And so -- and I don't think the jury had
14 intended to separate them. And the evidence is so -- "mixed
15 up" is the wrong word. Is so intertwined among all of the
16 claims that it would be, I think, almost impossible to say,
17 well, this theory goes to promissory estoppel and this one
18 doesn't. Because the evidence as a whole is what I
19 considered in my judgment, and I think the evidence as a
20 whole is what the jury considered in their judgment. And
21 that becomes even more important when we talk about
22 attorneys' fees. But that's part two of this hearing.

23 So I would love to see your proposed findings because I
24 have never entered 58 findings of fact in my life and really
25 hadn't planned on doing it on this case, but I may have to.

1 So I would like to see them now. If you would just file the
2 original and then give me a copy, please. Thank you. So
3 the --

4 MR. TIERNEY: So basically these are out of Plaintiffs'
5 motion, and the conclusion is taken from the proposed
6 findings that they submitted. There wasn't a conclusion in
7 the motion. So I can just say, Your Honor, it's a shorter
8 version of what they submitted, and it is essentially
9 complete compared to what was submitted with the motion.

10 THE COURT: Thank you.

11 MR. TIERNEY: Essentially. I don't want to say word for
12 word because we typed it up out of the one and there may be
13 some things that were in conclusions that are now in
14 findings or vice versa, but it's basically the same
15 paragraph.

16 THE COURT: And it does appear to have the basis for how I
17 reached my decision.

18 But I want you to take a look at it, please, Mr. Andersen
19 and Mr. Haberthur and Mr. Stephens, and respond.

20 MR. ANDERSEN: Could I be heard, Your Honor?

21 THE COURT: Sure. It's hard for me to stop you,
22 Mr. Andersen.

23 MR. ANDERSEN: Why now? I mean, it's frustrating. We put
24 in --

25 THE COURT: Well, we're -- we scheduled the whole day

1 because the Court anticipated this kind of thing based upon
2 having all you folks before me for several years now, so
3 we're going to go ahead and get this done today.

4 MR. ANDERSEN: Okay.

5 THE COURT: So...

6 MR. ANDERSEN: We -- and, actually, I had to buy
7 Ms. Schauer coffee this morning because I thought you might
8 want to make some changes to the findings fact and
9 conclusions. So she's got it on her computer. But,
10 Your Honor, I'm very --

11 THE COURT: Well, you and Mr. --

12 MR. ANDERSEN: -- frustrated, because there's a process.
13 They had it for a long, long time.

14 THE COURT: Mr. Andersen, we're going to finish today. So
15 we have the day so we're going to finish. And I guarantee
16 you we'll be finished by 3:00 today, so you'll be on your
17 way back.

18 MR. ANDERSEN: Thank you.

19 THE COURT: So look at what he has and look at yours and
20 then let me know what you think, okay? And I'll give you 15
21 minutes, or less if you don't need as much time. I'll be
22 back out in 15 minutes. Thank you.

23 MR. ANDERSEN: Thank you.

24 THE CLERK: Please rise.

25 (Recess)

1 THE COURT: Which one of you gentlemen wants to respond?

2 MR. ANDERSEN: I don't take issue with any of the proposed
3 findings of fact by the City because they did take what I
4 submitted to you when we argued this.

5 THE COURT: It looked like it was pretty accurate
6 factually. The issue is whether or not it goes far enough.

7 MR. ANDERSEN: Right. Now, they probably don't want you
8 to find Fact No. 16 because otherwise you would finding
9 damages of at least \$12 million. So I'm assuming that was a
10 mistake by Mr. Tierney. If not, we certainly would love the
11 Court to find that we were damaged \$12 million.

12 So, Your Honor, just quickly trying to go through these,
13 well, they have different conclusions of law, and I'm not
14 sure where they got the conclusions of law. So I guess I
15 have no objections to their proposed findings of fact. What
16 I tried to do in the 15 minutes was to circle my findings of
17 fact that I think we need in order to develop the record we
18 need to support your decision on appeal.

19 THE COURT: I don't have any problems with their findings
20 factually. I think that they're accurate. I read them over
21 carefully. I don't think they go quite as far and -- but I
22 don't think I need all of the findings that you have
23 submitted either.

24 MR. ANDERSEN: Agreed.

25 THE COURT: And so what I would like you to do is to

1 submit something in addition to me, if you would, please.

2 And after we get done with all the attorneys' fees and the
3 interest arguments, then you can do it all at once, but what
4 I would really like to have is I anticipate a findings of
5 facts around 30, 35 findings of fact --

6 MR. ANDERSEN: Okay.

7 THE COURT: -- with commensurate conclusions of law that
8 would be consistent. There's one or two of their
9 conclusions of law that we could probably argue about, but
10 for the most part the findings of fact that they submitted
11 are accurate. I just don't think they go far enough, and I
12 would like you to be a little bit more extensive than what
13 they have submitted.

14 MR. ANDERSEN: Could I do this? Could I have the chassis
15 be my findings of fact, take his that he's used -- because I
16 think the introduction, the court trial is just some
17 background that doesn't matter one way or the other.

18 THE COURT: That's fine. I have found over the course of
19 the last 16-plus years that at this stage of the game it's
20 better to be a little bit more inclusive than less inclusive
21 for a whole bunch of reasons, so yes. But I think you were
22 too inclusive in what you submitted to me.

23 MR. ANDERSEN: Sure.

24 THE COURT: And so I'd like to -- there's a happy medium
25 in there someplace, and I really would like to get that done

1 soon.

2 MR. ANDERSEN: Let me just talk to big issues because I
3 want to make sure that what we submit to you will work. As
4 Mr. Tierney objected to anything related to damages --
5 although he does have those in there so maybe that's not an
6 issue anymore. He objects to anything related to the
7 statute of limitations.

8 THE COURT: Well, I don't object to any of that.

9 MR. ANDERSEN: Okay.

10 THE COURT: That should be there because an appellate
11 court has to know what the grounds were that I made my
12 ruling. So, no, that's important.

13 MR. ANDERSEN: Okay. I think that answers the questions
14 we have. Your Honor, we will try. I'll have --

15 THE COURT: But there's a bunch of stuff in yours that
16 really don't need to be in there.

17 MR. ANDERSEN: We'll take care of that. And I think we
18 can have that to you -- we'd work on it over the lunch hour.

19 THE COURT: Well, if you can have it today, great. I'm --
20 we've had a very busy week, and I probably will start
21 wearing down about 3:00, so I'd give you advance warning.

22 MR. ANDERSEN: Okay. Thank you, Your Honor.

23 MR. TIERNEY: Your Honor, on the damages issue, we do
24 think the Court -- I included that because I said I was
25 going to put in what they put in their motion. And I put it

1 in, but I do object to findings on the damages. But
2 that's -- the Court has to specify exactly what it wanted to
3 find on the damages, but I should have pointed that out that
4 I left it as pristine as I could --

5 THE COURT: Well, and I --

6 MR. TIERNEY: -- even though I didn't -- I wasn't really
7 endorsing it, so...

8 THE COURT: I understand and I appreciate that. I believe
9 that we should -- I ought to be able to -- give me enough
10 that I can -- I may strike a couple of your findings and I
11 may modify some of the conclusions a little bit, but give me
12 something, try and get it to me in writing. I'm old school.
13 I like to have a piece of paper in front of me. So please
14 do that. Send it by Internet to Lisa and she'll print it
15 out for me.

16 MR. ANDERSEN: Thank you, Your Honor.

17 THE COURT: And I'll do my very best to get it done this
18 afternoon, but we have some other issues to resolve. And
19 I'll get it -- we'll try and get all of those resolved today
20 so that if the final pleadings aren't done they can be done
21 early next week or perhaps even this weekend.

22 The next issue is -- that I want to address is the issue
23 of interest. And I left my notes on my desk, so I'm going
24 to go get them. I'll be right back. You don't even have to
25 stand. I'll be right back. And I have a method to my

1 madness as to --

2 (Brief pause in proceedings)

3 THE COURT: Thank you all. Please be seated. Now, I
4 am -- I put this question to Mr. Tierney or Mr. Taylor,
5 whoever wants to address it. But I have reviewed the case
6 of Sintra v. City of Seattle, decided by our State Supreme
7 Court in 1997, and it's cited at 131 Wn. 2d. 640, and it was
8 cited by Plaintiff's brief in their reply. And the issue
9 becomes, number one, whether or not Plaintiff is entitled to
10 12 percent rather than some smaller amount. I believe you
11 mentioned 2 percent. And, number two, when that begins to
12 run. The plaintiff argues that it runs from the time of
13 taking, which was December 30 of 2009, and cites me Sintra
14 in support of that theory, basically, and analogizes this
15 kind of case to an inverse condemnation, or that kind of a
16 takings, and cites the statute and talks about how the
17 legislature was quite clear when they differentiated between
18 this kind of case and other kinds of cases that may involve
19 a government, a judgment against a government.

20 So go ahead, Mr. Tierney.

21 MR. TIERNEY: Well, I think the first thing to point out
22 about Sintra is that the parties agreed early on in the
23 trial that -- well, first of all, there was a claim made
24 for, in essence, prejudgment interest in the case. And the
25 parties agreed that that issue would be tried to the Court

1 and not submitted to the jury. And in the Sintra opinion,
2 it specifically says -- and I can find the citation, but
3 it's in the discussion on interest -- that ordinarily this
4 is an issue for the jury to decide, but that since the
5 parties agreed it would be tried to the judge. That's -- it
6 was being resolved on a post-trial motion. That's the
7 context of Sintra. Absolutely different from our case.

8 First of all, there was no claim made in this case for
9 prejudgment interest. It's not in the request for relief.
10 It's not in any of the pleadings. It's the first time we've
11 seen it anywhere in this case is, oh, let's go back and
12 let's give -- let's get the Court to award us an element of
13 interest for prior to the -- this case, much less the
14 judgment in this case. So that arose, whatever, two nights
15 ago or whenever that brief was filed is the first time we've
16 seen this in the case. Sintra, it was in the case from the
17 get-go. So a big differences between those two.

18 THE COURT: Okay. Before you go any further, let me ask
19 them to respond to that particular issue.

20 MR. TIERNEY: Okay.

21 MR. ANDERSEN: Your Honor, the -- we ask for interest.
22 And if you look at the Supreme Court's decision --

23 THE COURT: Mostly I want to know what you asked for and
24 when you asked for it. There's been a lot of claims here.

25 MR. ANDERSEN: Right. So in our takings claim -- both in

1 the federal one, but that was -- that's still on hold in
2 federal court. But on our state takings claim we ask for
3 all interest allowed under the just compensation clause.
4 Sintra says when private property is taken for public use
5 our state and federal constitution require the payment of
6 just compensation, which the Sintra court says is from the
7 date of the taking. And so it's not pre- -- they
8 specifically say -- Sintra says right here it's not an award
9 of prejudgment interest on a liquidated sum in the
10 traditional sense, but is a measure of the rate of return on
11 the property owner's money if there had been no delay in
12 payment.

13 So, Your Honor, we didn't have to ask for prejudgment
14 interest because the Supreme Court says this is not under
15 that category. It's not the conventional prejudgment
16 interest. It's a part of the damages that we're entitled
17 to. And the theory is that as soon as the government takes
18 your property, the theory is you're entitled to that -- the
19 value of that property going forward. So we didn't need to
20 allege in the traditional sense we're seeking prejudgment
21 interest. What we're seeking is the full value of the
22 property that was taken and the last date it was taken. It
23 may have been taken even before that, but we're being
24 conservative when we say December 30th of 2009 because we
25 had the temporary takings (inaudible) on the moratorium and

1 the development agreement, but we're taking a conservative
2 approach and saying when they finally acquired this property
3 for less than just compensation.

4 So, Your Honor, that whole theory about alleging
5 prejudgment interest when the Supreme Court says interest in
6 this context is not an award. This is on page 565 -- or
7 656, and this is headnote 5, Your Honor. It starts -- the
8 paragraph starts with, "In a conventional imminent domain
9 proceeding"?

10 THE COURT: Yes. I have it. "In a conventional imminent
11 domain proceeding, property is not taken or damaged until
12 just compensation is paid. But in an inverse condemnation
13 or quick-take action, under RCW 8.04.090, property is taken
14 before just compensation is paid. In these cases, we've
15 held that interest is necessary to compensate the property
16 owner for the loss of the use of the monetary value of the
17 taking or damage from the time of the taking until just
18 compensation is paid."

19 MR. ANDERSEN: And then if Your Honor -- just go down,
20 skip down where it starts with "We assume a person."

21 THE COURT: "We assume a person who received the money
22 value of his or her property as of the date of the taking
23 has a beneficial use available for these funds. Interest in
24 this context is not an award of prejudgment interest or on a
25 liquidated sum in the traditional sense, but is a measure of

1 the rate of return on the property owner's money that -- had
2 there been no delay in payment. The legislature codified
3 these principles in the quick-take provisions of
4 RCW 8.04.090 making the State liable for interest on the
5 difference between what it pays into the court registry and
6 the amount to which the owner is entitled."

7 MR. ANDERSEN: And then it goes -- the next paragraph, it
8 talks about since inverse condemnation -- I'm sorry,
9 Your Honor. In an inverse condemnation or temporary takings
10 it's not under the aboveboard condemnations, but -- so the
11 court construed the statute to say the property owner, who
12 the constitution says is supposed to be made totally whole,
13 is entitled -- or the statute says the highest interest rate
14 possible, which is the 12 percent. And they're saying we're
15 going to apply that back to the date that their property was
16 actually deemed to have been taken. So it is a prejudgment
17 interest. It's part of your -- if you take each claim with
18 regard to -- well, I'll stop there. I think I can't argue
19 better than the court has argued, both you and the Supreme
20 Court.

21 THE COURT: I have forgotten how fast your talk,
22 Mr. Andersen. We don't have a court reporter today.

23 Mr. Tierney, your response?

24 MR. TIERNEY: Well, for all of the speed of the
25 discussion, I still don't know what the answer is. I heard

1 Mr. Andersen say, "We asked for interest," and then I heard
2 him say, "We don't have to ask for interest," and I want to
3 know what the answer is to that.

4 THE COURT: Well, I'll --

5 MR. TIERNEY: I looked at the complaint. I looked at
6 the -- I just looked at the complaint. I read the section
7 on inverse condemnation and I read the request for relief
8 and they don't ask for interest. Now, he's saying that they
9 did. And maybe I missed it, and I'm perfectly open to being
10 corrected, but let's establish, first of all, whether it's
11 asked for in this case.

12 MR. ANDERSEN: Should I address that, Your Honor?

13 MR. TIERNEY: And then figure out where we stand. I may
14 have missed it.

15 THE COURT: Your response, Mr. Andersen?

16 MR. ANDERSEN: "For a determination of just compensation
17 for the permanent and taking of the property." "For a
18 determination of just compensation." We just saw the
19 Supreme Court establish that --

20 THE COURT: Is that in your original complaint for
21 damages?

22 MR. ANDERSEN: Yes. It's -- I think it's in the original.
23 I'm just looking at the third amended complaint, but we
24 alleged it.

25 THE COURT: That's fine. Then you amended.

1 MR. ANDERSEN: Do you want a copy?

2 THE COURT: Yes, please. And just hand it to me and I'll
3 hand it back to you. Just hand it to me and I'll hand it
4 back to you. Thank you.

5 It reads, "For a determination of just compensation for
6 the permanent and temporary taking of the property." I will
7 decide today that the case of Sintra v. City of Seattle
8 awards interest from the date of the taking; therefore, the
9 interest runs from December 30th, 2009. That is what the
10 jury decided. That is what -- that's the date that they
11 decided the taking occurred. That's the date that I believe
12 Sintra demands that interest be calculated from.

13 MR. ANDERSEN: Thank you, Your Honor.

14 MR. TIERNEY: Your Honor, question of clarification. You
15 said that's the date the jury decided that the taking
16 occurred?

17 THE COURT: As far as I'm concerned, they decided a taking
18 occurred. They decided the taking occurred when Mr. Kingen
19 or K&S lost their property. That date was December 30th,
20 2009. I don't really think that's an issue.

21 MR. ANDERSEN: We have a proposed judgment on that,
22 Your Honor.

23 THE COURT: I know you do.

24 MR. ANDERSEN: Okay.

25 THE COURT: You have a proposal on a lot of stuff, but all

1 right.

2 The next issue is attorneys' fees. And I have a box on
3 that, so let me go get that.

4 (Brief pause in proceedings)

5 THE COURT: Thank you. Please be seated.

6 Mr. Andersen, go ahead. Or Mr. Haberthur.

7 MR. ANDERSEN: Which -- Your Honor, there's two. We
8 thought the best way to handle this -- and I'm going to
9 start talking slower.

10 THE COURT: Whatever.

11 MR. ANDERSEN: The best way to handle this is you have
12 our --

13 THE COURT: I think that only lasts for about 30 seconds.

14 MR. ANDERSEN: So the best way to handle it is our
15 petition for attorneys' fees, Mr. Haberthur is going to
16 handle their request for attorneys' fees. Mr. Haberthur is
17 going to handle whether they're legally entitled to
18 attorneys' fees. If we get to the point of talking about
19 reasonable amounts of their fees, then you'll have to listen
20 to me again. Otherwise, Mr. Haberthur -- so I don't know if
21 you want to start with ours first and then go to theirs?
22 Okay.

23 THE COURT: Since you're asking for over 2 million, that
24 seems to be a reasonable place to start.

25 MR. HABERTHUR: Good morning, Your Honor.

1 THE COURT: Good morning, Counsel.

2 MR. HABERTHUR: So K&S is asking for its fees under the
3 takings statute. I don't think that's disputed. I think
4 the main issue that I want to talk about is we have
5 agreement, it sounds like, on the rates are reasonable.
6 There's some issue about the amount of time, but I think
7 what I'll start --

8 THE COURT: There's some issue on duplicative -- multiple
9 lawyers being at the depositions and being in court hearings
10 and what have you.

11 MR. HABERTHUR: Your Honor, I -- that is in there. And
12 maybe I'll start at the very beginning, because I think it's
13 important for the Court to know what steps I took to review
14 our fees before I submitted them, because I think that's a
15 critical piece that the Court needs to be aware of because
16 considerable amount of time went into looking at the fee
17 request first to try and take out any time that was
18 unrecoverable related to, maybe, Colliers', you know, part
19 of the case, unsuccessful motions.

20 And just by way of numbers, I first started at about
21 \$2.29 million. By reviewing that, I was able to reduce that
22 by \$431,000. So a significant amount was taken off, about
23 18, 19 percent. There is probably some time in there with
24 some overlap that was duplicative, but I think the Court
25 would agree this was an extremely complex case. There's a

1 lot of facts. It spanned a very large period of time and
2 probably one of the more complicated cases we've seen in a
3 while. A lot of different theories went into this, and as
4 the Court has already mentioned, those were intertwined.
5 The facts were not -- you know, those stayed the same, but a
6 lot of the theories did intertwine, and it's very difficult
7 to try and segregate those out.

8 So what I did next was reduce the paralegal time because I
9 think there probably was a question of "Is this pure
10 paralegal, is it clerical?" So another 42,000 came off the
11 top.

12 And there is case law, the Bright case versus Frank
13 Russell Investments, the most recent case, that talks about
14 rather than spending the time to go through line item by
15 item and make those adjustments the Court has authority to
16 make a percentage reduction. And that's what we've
17 proposed. We did have an expert review our billings to make
18 sure that they're appropriate, the time was reasonable, and
19 we submitted that. Off of that, there was a
20 recommendation --

21 THE COURT: They argued that I should not consider former
22 Justice Talmadge's declaration and his analysis because it
23 wasn't appropriate. What is your response to that?

24 MR. HABERTHUR: Your Honor, I think Mr. Talmage is an
25 expert on this issue. I think he's wide regarded in

1 Washington, has a broad depth of the case law and the
2 various approaches taken by the court. Mr. Talmage, I
3 think, was trying to be very careful not to invade to
4 province of the Court and tell you how to do your job, but
5 to give the Court guidance on --

6 THE COURT: He's done that on several other instances.

7 MR. HABERTHUR: Not in this case, Your Honor.

8 THE COURT: No, not on this case.

9 MR. HABERTHUR: But I think the declaration is helpful to
10 go through the lodestar approach, and Mr. Talmage makes the
11 recommendation of a 15 percent reduction, which we've
12 applied. So overall, those together, is --

13 THE COURT: But his argument of 15 percent is in response
14 to their judgment on their theories.

15 MR. HABERTHUR: I think it's -- I think that that's the
16 main thrust of it, but I think it also is supposed to take
17 care of any type of time that was duplicative or maybe not
18 recoverable. And what we've ended up with is a 70 percent
19 request from our original amount, and so that puts it at
20 \$1.6 million. I know that there's other costs and expert
21 fees that push it to 2 million, but we started at 2.2 and
22 we're down to 1.6. And perhaps the Court wants to make a
23 further adjustment. That's probably a lot easier than the
24 Court reviewing all of those billings. I have done that,
25 and I can tell you that was a multiple-hour endeavor. But,

1 Your Honor, we think that that 1.6 is a reasonable amount
2 given the amount of time that was spent on this case and the
3 amount of time in trial.

4 I know that there was an issue raised about the number of
5 attorneys that were involved, and as the Court is aware,
6 that this case was passed from the Ashbaugh firm to the
7 Landerholm firm, where we finished it out. There were some
8 other experts that we consulted with, including Mr. Stephens
9 for his guidance on the constitutional issues, and that
10 contributed to the recovery here.

11 So are there specific facts or issues the Court wants me
12 to address on the overall billings?

13 THE COURT: No. I think it would be -- I'll withhold my
14 comment. I want to hear what Mr. Tierney or Mr. Taylor have
15 to say. I think that -- I think you've done a commendable
16 job for trying to go through. I went through some of what
17 you had submitted. I was in practice myself for over 26
18 years, and I think I have a pretty good idea of what
19 billable rates are. And you have a very thorough -- I used
20 to manage a law firm, and you have a very thorough way of
21 summarizing your bills, and it was helpful to me, and I
22 appreciate that.

23 MR. HABERTHUR: Thank you, Your Honor.

24 THE COURT: And I've certainly seen a lot worse. Trust
25 me.

1 MR. HABERTHUR: Thank you, Your Honor.

2 THE COURT: So I -- and I appreciate the effort you went
3 through to try and be reasonable.

4 MR. HABERTHUR: Thank you.

5 THE COURT: Thank you.

6 Mr. Tierney.

7 MR. TIERNEY: Thank you, Your Honor. I'd like to start
8 with the question of what is the gross amount of bills that
9 were -- what's the starting point? What's the gross amount
10 of attorneys bills that K&S incurred?

11 THE COURT: Well, I think he started at 2.2.

12 MR. TIERNEY: Yeah. And I don't see that number anywhere.
13 I don't know where that comes from. It's not in a
14 declaration. And I'd ask the Court, do you have the --

15 THE COURT: I didn't go through and add everything up.
16 Maybe I should have, but --

17 MR. TIERNEY: Well, do you have the Haberthur declaration
18 with you?

19 THE COURT: I think I probably do.

20 MR. TIERNEY: If you could turn to page 5 of that?

21 THE COURT: All right.

22 MR. TIERNEY: It's paragraph 19.

23 THE COURT: I have it.

24 MR. TIERNEY: It says there he adds up all the -- or he
25 describes all the firms, and he says their total is

1 1,945,000, costs are 76-plus. K&S total attorneys' fees and
2 costs incurred in the case is 2,021,000. Do you see that?

3 THE COURT: I do.

4 MR. TIERNEY: That's the only number I have seen that is
5 the starting point of their analysis. I don't know where
6 the other comes from. And, again, I'm happy to be corrected
7 because there's a lot of stuff here. And I just went -- I
8 looked at what's in the declaration, and then I looked at
9 the exhibits to try to piece together what had happened.
10 Because what Mr. Haberthur had said in his declaration is he
11 took the gross amount of the bills, and in their term, they
12 "scrubbed" them. They scrubbed them and took out all of the
13 duplicative or extra work or issues that weren't related to
14 the takings. That's what he said he did. And I don't see
15 where that happens. And I'd be happy to be corrected on it.
16 But what I did was go to the exhibits. The Landerholm bills
17 are Exhibit J and the Ashbaugh bills are Exhibit F, okay?

18 THE COURT: Um-hum.

19 MR. TIERNEY: So Exhibit J and Exhibit F. And I thought,
20 well, he says they struck out a lot of time, they subtracted
21 time from those bills. And I looked at the bills. The copy
22 I got doesn't have anything stricken out, not one hour. I
23 don't see where it ever occurred. I hear them saying it.
24 And like I said, I might be missing it, but if they can show
25 me where any time was cut from the gross amount in this

1 scrubbing process then we'll have a starting point. And --

2 THE COURT: Okay. Don't go any further. Let me ask
3 Mr. Haberthur to respond.

4 MR. HABERTHUR: Your Honor, I see where we're going. I
5 can answer this very clearly. The burden is on the party
6 seeking fees to submit what I'm going to call "clean"
7 billings to the court. I didn't give you everything.
8 Frankly, I didn't think you wanted to waste your time
9 looking at all of that because I know a large chunk of it
10 that I took out wouldn't be recoverable. I probably was a
11 little bit heavy with the editing. But I didn't want to
12 give the Court a bunch of fees that we weren't seeking, and
13 so I did that work the first time. Because the starting
14 point, Your Honor, is what was submitted to the Court. I'm
15 not asking for the fees that I've already removed, scrubbed,
16 excised. Those are taken out. So the starting point is
17 what's before the Court today. I mentioned those numbers
18 this morning just to give a frame of reference.

19 THE COURT: No, I understand.

20 MR. HABERTHUR: But --

21 THE COURT: So you're saying the starting point after you
22 did your scrubbing is 1.9, basically.

23 MR. HABERTHUR: Yes, Your Honor. And then the 15 percent
24 reduction got us to the 1.6.

25 THE COURT: All right.

1 MR. HABERTHUR: But, Your Honor, I think the case law is
2 very clear --

3 THE COURT: We'll talk about that in a minute.

4 MR. HABERTHUR: Okay. All right.

5 THE COURT: Mr. Tierney.

6 MR. TIERNEY: Well, I think that's problematic,
7 Your Honor, because, well, one, we --

8 THE COURT: Well, let me ask you this question,
9 Mr. Tierney. They're entitled to attorneys' fees. The case
10 law supports it. What do you think a reasonable fee is for
11 them?

12 MR. TIERNEY: Well, I think a reasonable fee -- you mean
13 a -- we're not challenging their hourly rates, if that's the
14 question.

15 THE COURT: No. I understand that. And that was
16 represented to me by counsel.

17 MR. TIERNEY: I think there has to be a percentage -- if
18 you're asking me, I can only go on what we see in our bills
19 as what was devoted to the issues that we prevailed on and
20 what was devoted to where it appeared the plaintiff
21 prevailed, which was basically the first time frame. I
22 divided that 55/45.

23 THE COURT: Well, so let me give you a hypothetical.
24 Hypothetically, they're asking for 1.9 million in attorneys'
25 fees. You're not disputing the rate per hour, but you're

1 saying that they should only get 55 percent of that; is that
2 correct?

3 MR. TIERNEY: In essence, I think. But we have to see
4 where we -- how we get to that starting point.

5 THE COURT: This is your time to tell me.

6 MR. TIERNEY: I just asked for it and was told that the
7 material was not provided.

8 THE COURT: I'm convinced that 1.9 million of fees is what
9 was -- is what they're seeking and is what was billed. I
10 could go through and add up page by page. But there were a
11 number of pages that had 10,000, 70,000, and I stopped
12 adding at some point way after midnight one night because I
13 decided it would be much more beneficial for me to use my
14 time talking like we're talking now. Because I have to
15 apply a lodestar figure. I believe that also is the law and
16 the requirement for me to apply a lodestar figure, and I
17 think, therefore, that the 1.9 million, which I'm convinced
18 is an amount that is -- the plaintiff's are seeking in
19 attorneys' fees, needs to be reduced by a certain amount.
20 Mr. Haberthur says it should be reduced by approximately 15
21 percent, which gets us down to 1.6. You say 55 percent,
22 which -- or by 45 percent.

23 MR. TIERNEY: Reduced by 55.

24 THE COURT: It needs to be reduced by 45 percent, which
25 gets us down to a little over a million. So tell me why.

1 MR. TIERNEY: Because what's missing is showing some sort
2 of method for determining out of that -- let's say I agree,
3 all right. It's 1.9 is the post scrubbing number. And my
4 first point was just they say that, but they haven't given
5 us that information, but -- so we'll take that, so...

6 THE COURT: You and I aren't going to agree on that, but I
7 can going to find that that is the post-scrubbing number,
8 period.

9 MR. TIERNEY: That's -- I'm not disputing. I'm just
10 pointing out that I didn't have that material and I don't
11 see it, so it's hard to -- but I think we need information
12 in order to determine what percentage should be reduced. So
13 the way I went about it in my bills was I looked at -- I
14 gave the Court a hundred percent of our bills. Not post
15 scrubbing. A hundred percent. And I tried to show the
16 scrubbing process for us, which was to look at these things
17 and say, well, some of these it's clear what they were on,
18 others it's not clear what they were on, and we have to do
19 the best we can do to divide between what are attorneys'
20 fees claims and what are not attorneys' fees claims. And I
21 did that process for us and I came up with 55 and 45.
22 That's where my number comes from.

23 And what I would propose -- what I would have expected
24 from the plaintiffs was show us what you took out. Show us
25 how you divided up between what was related to what you're

1 asking fees for and what it is that your agreeing that
2 you're not asking fees for. And we don't have that to see.
3 So all I can do is fall back on the percentages that I
4 derived from our bills. And I started with a hundred
5 percent.

6 And I will admit, Your Honor, it is a very imperfect
7 process to look at bills and say, all right, we're talking
8 about discovery issues. So discovery issues on what claim
9 or what not claim? So I -- we took a limited amount where
10 it was clear what the fees were for and we created a ratio
11 based on that. And I fully admit that that is an imperfect
12 process. But I showed the work at least. And that's what I
13 am saying is missing in the plaintiff's is showing some
14 basis to cut 10 percent, 15 percent, 25 percent, whatever
15 the number is. Show us an analysis that gets you that
16 number. And I think instead all that the Court is left with
17 is saying from the plaintiff: We think you should cut 15
18 percent off, and we got a declaration from another lawyer
19 that says he thinks 15 percent is good, too, so...

20 THE COURT: You objected to Phil Talmadge's declaration.

21 MR. TIERNEY: Yes.

22 THE COURT: And the way --

23 MR. TIERNEY: I think that's the Court's function.

24 THE COURT: The way -- well, the way I look at it is that
25 Mr. Talmage, who has been before me several times, and who

1 has lost probably more than he has won, I think is a really,
2 really good lawyer who I respect, but he's just giving us an
3 opinion. He doesn't carry the day, and I'm not intending to
4 think in any way that his declaration or suggestions are in
5 any way mandatory for me to follow. They're a suggestion --
6 which I appreciate suggestions, quite frankly. I think you
7 all know -- you've been in front of me enough to know that I
8 will take constructive suggestions any way I can, and that's
9 how I take this. But that's all I take it as.

10 MR. TIERNEY: I agree that that's all that it is,
11 Your Honor, and I -- my point is that there -- this is an
12 analytical exercise and it's a very imperfect one and --

13 THE COURT: Boy, it really is, Counsel.

14 MR. TIERNEY: Yeah.

15 THE COURT: One of the hardest things we have to do in any
16 case is to try and award attorneys' fees because they're --
17 number one, it's discretionary, and, number two, we've got
18 this ridiculous thing called a lodestar in the state of
19 Washington that nobody really understands how it works. It
20 works to the benefit of whoever it is who is asking us to
21 apply it, but it -- you know, and I don't know that the
22 Supreme Court really understands how it works either. I've
23 tried to read cases on it over the years that would give me
24 some grounds for clarification and assistance, and I haven't
25 found very much. So I do know that it's pretty

1 discretionary with the trial judge.

2 I also know that attorneys' fees are warranted in this
3 case because of the law. I believe that that's not always
4 the case. A lot of situations, attorneys' fees are not
5 warranted. A lot of situations, there's no statute, there's
6 no case law. In the state of Washington, thankfully, I
7 suppose in some ways, we don't have very many cases where we
8 do award attorneys' fees, but this is an exception to that.
9 So --

10 MR. TIERNEY: So --

11 THE COURT: Because of the unique issues involved, I
12 believe that there's ample authority to award fees.

13 MR. TIERNEY: Well, Your Honor, we're not contesting that
14 at all.

15 THE COURT: Yeah, I know that.

16 MR. TIERNEY: And if --

17 THE COURT: And your response is --

18 MR. TIERNEY: Yeah. It's just a question, all right,
19 given this gross amount, what do you -- how do you go about
20 picking a percentage that's going to be awarded? And, you
21 know, I'm saying that it's --

22 THE COURT: Well, I have to consider the amount of your
23 fees. I have to consider the fact that you obtained a
24 judgment on behalf of your client on a couple of theories
25 that, quite frankly, should be subtracted from the

1 plaintiff's gross amount in a final judgment. And then I --
2 I also have -- I thought a lot about this because I think
3 the hourly rates are fair and reasonable, but I also think
4 that there was some duplication of effort. I know that --
5 and I trust what Mr. Haberthur said about trying to scrub as
6 much as he could out, but I still think there's no
7 duplication in there. And there is also a setoff because of
8 the issues that the defendants prevailed on.

9 So before we finish this, I would like to ask about the
10 expert fees. It seems to me you're only entitled to expert
11 fees on those theories that you prevailed, and you're not
12 entitled to expert fees on the theories you didn't prevail
13 on, and so I'm not sure that you get all the expert fees
14 that you wanted to get. Now, the attorneys' fees, I'm
15 assuming that Mr. Stephens and his partner's fees are
16 included in the attorneys' fees and not on the expert fees.

17 MR. ANDERSEN: Correct.

18 MR. HABERTHUR: Yes.

19 THE COURT: Okay. And I assume that's part of the
20 1.9 million, which is your net.

21 MR. HABERTHUR: That's correct, Your Honor. The expert --

22 THE COURT: And I'm assuming that Ashbaugh's firm also is
23 included in that number?

24 MR. HABERTHUR: That's correct.

25 THE COURT: Okay. All right. So tell me about experts,

1 Mr. Haberthur. It seems to me you've asked for a little too
2 much on the expert fees.

3 MR. HABERTHUR: Your Honor, the statute does allow for
4 expert fees, so we have asked for --

5 THE COURT: The statute, I think, begs the question -- the
6 statute, I don't think, ever assumed that there would be
7 nine causes of action of which you prevailed on three or
8 four and not on the others, and therefore you should only
9 get the expert fees on those causes of action on which you
10 prevailed.

11 MR. HABERTHUR: Your Honor, if I understand correctly, the
12 City is taking issue with Mr. Hill and Mr. Johnson as far as
13 the expert fees. Are those --

14 THE COURT: They are.

15 MR. HABERTHUR: -- the two to address?

16 THE COURT: Yes.

17 MR. HABERTHUR: Mr. Hill was a nontestifying expert, as
18 the Court is aware. He was hired. The thought was he would
19 likely testify at trial. Mr. Hill was deposed, and the
20 Court later entered an order stating we had to go with only
21 a couple of experts.

22 THE COURT: You have to pick one or the other and you
23 picked --

24 MR. HABERTHUR: Oh, sorry. That was on the planners,
25 Mr. Geyer or Mr. Thorpe.

1 THE COURT: Oh, okay. I'm sorry.

2 MR. HABERTHUR: So Mr. Hill, I believe --

3 MR. ANDERSEN: We just didn't call him.

4 MR. HABERTHUR: Yeah. Just didn't call him at trial, but
5 he would have testified in response to some of the
6 plaintiffs' -- or the City's witnesses. He did not actually
7 testify. He was just a consulting expert for us. I think
8 his fees were in the neighborhood of 25-, 30,000 dollars.

9 THE COURT: I thought 24-something, but whatever.

10 MR. HABERTHUR: Yeah, so right in there. He did provide a
11 valuable service to us, Your Honor, but if -- honestly, it's
12 not a huge amount, and we'd be --

13 THE COURT: Well, I'm inclined not to award his fees to
14 you. Because I think a strict reading of the statute, he's
15 a consulting expert that you chose to hire and work with you
16 and -- but I don't think I'm going to award that.

17 MR. HABERTHUR: That's fair, Your Honor.

18 THE COURT: The other one.

19 MR. HABERTHUR: Mr. Johnson was the damages expert.

20 THE COURT: He did testify.

21 MR. HABERTHUR: He did testify. I believe -- I was trying
22 to put my finger on it. I believe his fees were right
23 around 200,000. And, I'm sorry, I lost my place there,
24 but --

25 MR. TIERNEY: 207, I think.

1 MR. HABERTHUR: I'm sorry?

2 MR. TIERNEY: I think it was 207.

3 MR. HABERTHUR: 207. Thank you.

4 MR. TIERNEY: I think.

5 MR. HABERTHUR: Right around 200,000. Mr. Johnson did do
6 a lot of work in this case. The damages --

7 THE COURT: I hope he did.

8 MR. HABERTHUR: It wasn't just "throw it up against the
9 wall." It was quite a bit of work. I'd also like to point
10 out that Mr. Johnson was deposed for, I think, right around
11 10 hours. So a significant amount of work was done by
12 Mr. Johnson just to address discovery issues, work with us
13 on the different scenarios, which I think the Court would
14 agree were fairly complex. The facts in this case were such
15 that a significant amount of work was done to not only come
16 up with those scenarios but to rule out other things. So we
17 think that amount is a reasonable amount.

18 And, Your Honor, reading the statute in the context of
19 just compensation and what the constitution is supposed to
20 provide, it's supposed to make an unwilling seller of
21 property whole, and that's what the point of the cost is.
22 So we believe that those costs should be recoverable because
23 we have to put that evidence on in order to recover our
24 damages, and it was relied upon by the Court.

25 THE COURT: Did Mr. Johnson assist you in the discovery

1 process?

2 MR. HABERTHUR: Mr. Johnson assisted with the timelines
3 that we helped put together, so he was -- before he would do
4 anything, he had to read the materials and verify and not
5 just take our word for it.

6 THE COURT: Did you require the assistance of an expert to
7 obtain the discovery that you believe the City had and you
8 made a public records disclosure request, and then you
9 followed up with more requests and ended up finding more
10 information and material?

11 MR. HABERTHUR: That's --

12 THE COURT: Did he help you with that?

13 MR. HABERTHUR: Not --

14 THE COURT: Was he telling you that there was stuff
15 missing?

16 MR. HABERTHUR: I don't recall that, Your Honor. He
17 assisted at the end with some of --

18 THE COURT: And Mr. Murphy, his fees were part of the
19 attorneys' fees portion?

20 MR. HABERTHUR: No, Your Honor. We did not include
21 Mr. Murphy. We did include Mr. Overstreet with the Allied
22 Law Group in the attorney fee component. It was between 8-
23 or 9,000. I think \$8,500. He was the one that did the
24 public records request.

25 THE COURT: Okay.

1 MR. HABERTHUR: But Mr. Murphy's fees were not included,
2 and that includes time testifying at trial. Those we didn't
3 ask for.

4 MR. TIERNEY: He didn't bill.

5 MR. HABERTHUR: I don't know for certain.

6 THE COURT: Did you ask for his fees that he incurred
7 during the negotiation that he participated in with the
8 City?

9 MR. HABERTHUR: No, Your Honor. No. The attorneys' fees
10 started with the Allied Law Group shortly after the deed in
11 lieu, and then it was just a very small -- I mean, \$8,500.
12 And then it went to the Ashbaugh firm. There was some time
13 from the Schwaby (phonetic) firm, where Mr. Andersen was at
14 prior to Landerholm, but again, that was a fairly small
15 amount, and then to Landerholm. So we're not seeking any of
16 Mr. Murphy's fees or Mr. McInerney's fees. As the Court may
17 remember, he was also involved in the deed in lieu
18 negotiations and then afterwards, but we didn't include
19 these bill ings after.

20 THE COURT: And it was until his unfortunate passing?

21 MR. HABERTHUR: Yes, Your Honor.

22 THE COURT: I remember that.

23 MR. HABERTHUR: And, Your Honor, the last point about
24 Mr. Johnson is that testimony was required under the jury
25 instructions. The Court may remember Jury Instruction 7

1 specifically talked about the takings and what damages would
2 be required to be proven, and Mr. Johnson testified to that.
3 And we did bring a copy if you'd like to review that.

4 MR. TIERNEY: May I approach the bench?

5 THE COURT: I actually printed those out the other day,
6 but I left them on my desk, so I'd like to see that again.

7 MR. ANDERSEN: Oh, here's the complete set.

8 THE COURT: You might tell counsel what you're handing me.

9 MR. ANDERSEN: And I'll give him copies, too. These are
10 instructions -- Jury Instructions No. 7 and Jury Instruction
11 No. 27.

12 MR. HABERTHUR: So on reviewing Instruction No. 7, you'll
13 see on the first page there that the jury was asked to
14 consider the economic impact on K&S's property and the
15 extent to which the actions interfered with K&S's
16 reasonable, distinct investment-backed expectations. And
17 that's exactly what Mr. Johnson testified to. So the fees,
18 we believe, should be recoverable. There probably could be
19 a question about the amount. But all of the billings are
20 submitted, and we don't believe any of that time was
21 duplicative, and a lot of it was driven in response to the
22 facts and as this lawsuit progressed to trial.

23 THE COURT: Any response, Mr. Tierney?

24 MR. TIERNEY: Yes, Your Honor. There are some important
25 distinctions. They may sound like fine points, but they're

1 very important distinctions in the law of inverse
2 condemnation. There's a difference between the character of
3 a taking and the damages resulting from a taking. There's a
4 difference between the goal of just compensation and what
5 that measurement consists of. Those are each separate
6 things. The character of a taking can be determined by the
7 effect of a regulation on investment-backed expectations.
8 That determines whether the nature of the regulation amounts
9 to a taking. That isn't a measure of damages. That's an
10 analysis of a character of a taking. The measure of damages
11 in a takings case is the difference between the decline in
12 the market value of the property at the time of the taking.

13 So in a regulatory taking's instance, if you impose
14 wetland regulations and you reduce the value of the property
15 from a million dollars to \$750,000, the takings is that
16 reduction in value, is that \$250,000 item. That's an
17 appraisal issue. That's a measure of damages that's done by
18 an appraiser. The goal of using that measure of damages is
19 for just compensation. Now, just compensation isn't an
20 elastic concept that's used to -- for any kind of approach
21 to damages. The Peterson case, which we cite a couple of
22 times, the Tony v. Olympic Pipeline case, those are takings
23 cases, and they -- and the doctrine of the -- the principles
24 long established in Washington law as to what the measure of
25 damages, and the measure of damages is a decline in market

1 value of the property. Just like a regular imminent domain
2 case. You know, what's the government willing to pay for
3 the property? What does the jury decide what the property
4 is worth? That's what the award ends up being is that
5 difference.

6 So Mr. Johnson didn't testify about the damages from
7 taking. The damages from taking are a decline in market
8 value. Mr. Johnson testified about other measures of
9 damages for other causes of action: The tort claims, the --
10 their attempt at getting contract damages, the
11 misrepresentation claims. Those -- his main focus in his
12 testimony was on the profit stream, was on what could they
13 have made if they had built a park-and-fly at different
14 points in time. And then under other scenarios, it was what
15 could they have made if they built apartments at different
16 points in times. So it had to do with an income stream,
17 which is a tort measure of damages. And that's an important
18 distinction here. You know, what did Mr. Johnson actually
19 testify about in terms of the relevant damages? And what he
20 testified about were tort damages. And presumably,
21 according to the plaintiffs' arguments on promissory
22 estoppel, he testified about promissory estoppel damages
23 because they're saying a hundred percent of the damages are
24 also promissory estoppel damages. And they can't all be the
25 same thing because some are an entirely different measure.

1 And Mr. Johnson only testified about those tort damages, not
2 about takings damages.

3 That's our position on Mr. Johnson's fees, entirely apart
4 from the fact that it was a damages expert that they spent
5 200-something thousand dollars on, which I've never come
6 across. But leaving that aside, what he testified about was
7 not takings damages. That's our argument.

8 THE COURT: All right. Thank you.

9 Any response?

10 MR. HABERTHUR: Your Honor, Mr. Johnson testified to show
11 the economic impact that the takings had on K&S. Beyond
12 that, trying to parse it out as to what the jury relied upon
13 how they awarded damages, that's too difficult. That's not
14 what we're here to argue. But the Jury Instruction No. 7 on
15 the takings claim does have very specific instructions to
16 the jury that they had to use that evidence from
17 Mr. Johnson. So whether Mr. Johnson was the right guy,
18 that's really not the issue. It's what did Mr. Johnson
19 testify to the takings fees, and that was the economic
20 impact it had on K&S.

21 THE COURT: All right. I'm -- this is an undifferentiated
22 amount of money. And the jury didn't say, well, we award
23 this much on a takings and we award this much on a lost
24 potential income and we award this much on all the money and
25 time and effort that K&S had to go through to try and comply

1 with the City's requirements that were constantly changing.
2 What they decided was this amount of money -- 9.3,
3 approximately, million dollars -- was the total amount of
4 damages that would be fair and reasonable under the
5 circumstances.

6 When I made my interest award, I believe that you have to
7 pick a date, and the date for my purposes was December 30th,
8 2009, because I think that's really the last date that I
9 could have picked. But I believe that the plaintiffs were
10 damaged and suffered damages and suffered losses for several
11 years before that, and that includes trying to negotiate
12 with the City and hiring experts and hiring lawyers and
13 hiring -- and working with the City to try and comply with
14 the City's requirements, that seemed to be a work in
15 progress, seemed to be continuing. "Well, if you do this,
16 it will be okay." And then, "No, we've changed our mind.
17 If you do this, it will be okay." That started, what, 2004,
18 2005. So the damages really started then. So my picking
19 December 30th, 2009, is -- I think you have to pick a date
20 that you go back, and that seems to be the date that is, in
21 my opinion, quite frankly, the most conservative date to
22 pick. Because it's really when Mr. King had lost the
23 property, and so he clearly at that point in time had no
24 recourse except the lawsuit. So that -- I want to clarify
25 that. I want to make sure that the findings clarify that

1 point as well.

2 Also, Mr. Johnson, I'm not going to give you 207,000. I
3 don't -- I do agree with Mr. Tierney. I've never seen a
4 damage expert bill that much, but -- and I've seen a lot of
5 bills. But I think, under the circumstances, for
6 Mr. Johnson the Court will award \$150,000.

7 MR. HABERTHUR: Thank you, Your Honor.

8 MR. ANDERSEN: Thank you.

9 THE COURT: And there's no money for Mr. Hill, as I think
10 I indicated before.

11 Attorneys' fees. There is a lodestar factor. I do think
12 that the law indicated by Mr. Talmage and his material is
13 pretty accurately stated, and it's the same law that I think
14 is proper. I've always thought that what he has indicated
15 in his brief is what I've tried to follow in the past when
16 I've looked at attorneys' fees, and there's nothing
17 different in there than my understanding of the law. If the
18 appellate courts think differently, it would be a departure,
19 it seems to me, from what the current status of the law is.

20 I do think that a lodestar amount -- I think that the
21 defendants are entitled to a reduction because they did
22 prevail on a couple of the claims, and the plaintiff did
23 dismiss a couple claims, and we ended up with -- we started
24 with nine or ten claims, I think, and we whittled that down
25 to four or five. So I do think that -- and the defendants

1 obtained a setoff, it seems to me, by the jury. What?
2 257,000 or 227,000 by the -- on award -- on their award from
3 the jury on the contract violations, and under that they're
4 entitled to attorneys' fees as well.

5 So it seems to me, taking everything into consideration,
6 and the fact that Colliers was an intimate part of this and
7 then you ended up dismissing them or resolving your dispute
8 with them at the last minute and they went away, so any
9 amount of money that could arguably be attributed to
10 Colliers has to be subtracted from your award also.

11 So I'm willing to award -- I'm going to assume -- I'm
12 going to take your at your word, Mr. Haberthur, and that the
13 plaintiffs are seeking \$1.9 million in attorneys' fees, all
14 right?

15 MR. HABERTHUR: Correct.

16 THE COURT: And I'm going to apply a 65 percent lodestar
17 figure to that. You're entitled to 65 percent of that,
18 having -- taking into consideration all of what I just said.
19 I think that that's fair and reasonable.

20 I also want to make sure that there is no mistake on the
21 part of the defendants or the plaintiff that the City
22 engaged in a pattern of deception that lasted years, and
23 because of that, the Kingens' damages are not just limited
24 to losing the property. The Kingens' damages spanned a
25 number of years. I'm sure -- I didn't talk to the jury. I

1 don't talk to jurors about why they decided certain things.
2 I leave that for the attorneys to do because I don't think
3 it's proper for a judge to ask jurors why they decided an
4 issue in a certain way. The attorneys sometimes come and
5 tell me later after they've spoken with the jurors, but I
6 don't seek that information. I am supposed to be a referee.
7 I'm supposed to do the very best I can to give the jury the
8 proper law and make sure that they get evidence which is
9 appropriate and then they have to do their job, and I try
10 very hard not to interfere with that. So I don't know
11 everything that they considered when they made their award.
12 I can only surmise, based on how I felt listening to the
13 evidence during the course of the trial, that the jury was
14 upset with the actions of the City.

15 A government entity owes a duty of honesty and
16 transparency to those people to whom they deal with. It
17 doesn't matter who those people are. It doesn't matter
18 whether they like those people or they don't like those
19 people. Governments are in unique positions. There is a
20 Public Disclosure Act. There are all kinds of cases in this
21 state which uniformly say that governments have to be open,
22 honest, and straightforward in their dealings with everybody
23 because that's their job. They're supposed to represent us.
24 It doesn't matter whether it's the City of Tukwila or the
25 City of SeaTac or the County of King or the State of

1 Washington. They represent us. And because of that, they
2 have a duty of honesty and transparency. The City violated
3 that duty so many times I've lost count, and it is not -- it
4 is -- it's amazing. Quite frankly, the actions of the City
5 of SeaTac in this case are unexplainable and totally
6 unacceptable. The period of deception even lasted through
7 their answer in the public records -- for the public
8 records, for the disclosure. And so the plaintiff had to go
9 about getting those records and had to spend more time and
10 effort and money to get those records than they ever should
11 have had to. Why? Well, the City obviously had something
12 to hide. So I find -- as someone who works for the
13 government, I find this to be the worst thing about this
14 case is the actions of the City and how dishonest they were,
15 and I find that to be completely and totally unacceptable.
16 I don't know how the jury felt about it, but I can only
17 suspect that that was probably one of the reasons why they
18 awarded the damages they did, because they felt the same way
19 I did.

20 So I've tried to be really fair and reasonable when I have
21 made the award of attorneys' fees. I believe that a
22 lodestar figure of 65 percent on a figure of 1.9, which is
23 scrubbed before and ends up with, what, about 1.3, something
24 like that? 1.2, roughly? That an interest rate -- I
25 believe that the case law requires the imposition of

1 interest. This is constitutional taking, after all, and I
2 believe that 12 percent is what is required. It wouldn't be
3 what I would have chosen, but that's what the legislature
4 has chosen. I would have chosen something around 2 or 3
5 percent because I think that's probably the real amount of
6 money that was going on in 2009 and 2010. But the
7 legislature didn't feel that way, and we do have to follow
8 the law, and the law says 12 percent. I believe picking a
9 date of December 30th, 2009, as I indicated, is
10 conservative. Could have gone back earlier. But I think
11 that is a date that everyone can agree that Mr. King had
12 lost the property on that date. It seems to be an easy day
13 to pick for purposes of calculating interest.

14 The last thing I would say, and I would say this to the
15 City of SeaTac. This isn't part of the findings, and I
16 don't want it to be part of the findings. I think the City
17 of SeaTac was very, very ably represented during the course
18 of their trial by Mr. Tierney and Mr. Taylor. I believe
19 that it's hard to make a silk's purse out of a sow's ear.
20 And, gentlemen, you performed incredibly admirably. You
21 were very worthy advocates. And regardless of what you
22 think of me, that's what I think of you, and I don't mind
23 telling anybody that.

24 But there is certainly some evidence to suggest that
25 during the course of the negotiations with K&S the City

1 Attorney's Office participated in this profound and
2 unacceptable pattern of deception. That violates the rules
3 of professional conduct. That is totally and completely
4 unacceptable to this court, and it should be to any court.
5 Lawyers have rules that they have to abide by, and the very
6 first rule of being a lawyer is to be honest, to not allow
7 the client to dictate dishonesty. That was not complied
8 with in this case.

9 I have never filed a complaint against a lawyer, but I
10 would seriously recommend that you take some advantage to do
11 that, counsel, because that can't be allowed to exist. I
12 don't think Ms. Bartolo, there's no evidence to indicate she
13 had anything to do with this, but there certainly is
14 evidence to indicate that another assistant city attorney
15 did, talked to Mr. Murphy. His testimony rings quite
16 profound to me, and he had never had anybody make
17 representations to him like that. Poor Mr. Murphy, who is
18 now suffering the effects of a stroke, but nevertheless, he
19 mustered the energy to get up and testify that they had
20 never had a city act like that. And when he asked the
21 assistant city attorney what was going on, he was purposely
22 misled. That lawyer should be disciplined. We don't do
23 that. Lawyers don't do that. We are held to a higher
24 standard of care, and for us to disregard that and to allow
25 our clients to dictate the terms of our performance is

1 unacceptable.

2 So those are my observations. I want you back here at
3 1:30 with some proposed findings and an order. Actually,
4 let's make it 2:00. You've got one hour starting at 2:00.
5 I want to see if we can get everything done today.

6 MR. ANDERSEN: Before you leave, Your Honor, one point of
7 clarification. I'm taking from your order that what you
8 have done is combined the City's request for attorney's fees
9 and our request --

10 THE COURT: Yes, sir.

11 MR. ANDERSEN: -- and --

12 THE COURT: There's a set off.

13 MR. ANDERSEN: Set off of 65 --

14 THE COURT: That lodestar factor of 65 percent takes into
15 consideration their request and is an offset.

16 MR. ANDERSEN: Okay. We'll prepare the orders. We'll see
17 you at 2:00?

18 THE COURT: Thank you.

19 MR. HABERTHUR: Thank you, Your Honor.

20 MR. ANDERSEN: Thank you, Your Honor.

21 THE CLERK: Please rise.

22 (Recess)

23 THE COURT: We're now on the record. I would like to,
24 first of all, review the order granting attorneys' fees.
25 Now, I didn't come up with a specific figure on paragraph 5

1 on page 3 for the City. What I tried to do was give the
2 City a significant offset by coming up with the 35 percent
3 lodestar figure. So I'm not sure that the wording of that
4 is what I found. We all get to the same spot, but --

5 MR. HABERTHUR: Your Honor, if I may, that -- I know we
6 were starting with the answer and trying to get back -- work
7 backwards. And so that was the amount the City was
8 requesting, and so we just put the full amount of their fees
9 and the full amount of their costs in there. But I --
10 again, I don't know if that's -- if the Court made a
11 specific finding, but that was the amount that they
12 requested, so I think with that starting figure we could
13 then apply the lodestar.

14 THE COURT: All right.

15 MR. HABERTHUR: That was the intent of pulling it there.

16 THE COURT: All right. So this is -- this corresponds to
17 your \$1,945,000 figure?

18 MR. HABERTHUR: And I'll ask Mr. Tierney to correct me,
19 but that was the 44.8 percent that they were requesting. I
20 think they were starting with a higher number.

21 THE COURT: But that's what they're requesting, and you
22 were requesting 1,945,000.

23 MR. HABERTHUR: Oh, yes, that's correct, Your Honor. Yes.
24 Thank you.

25 THE COURT: All right. So as to the attorneys' fees

1 order, is there anything else? That was the last one we
2 got.

3 So, Mr. Tierney, is there anything that you have to say
4 about that?

5 MR. TIERNEY: I'm still reading it, Your Honor. I
6 think -- so is the -- and I'm sorry. If I might address
7 Mr. Haberthur, Your Honor?

8 THE COURT: Sure.

9 MR. TIERNEY: So is the -- this number basically the same
10 as the 35 percent?

11 MR. HABERTHUR: That was the number that you were
12 requesting.

13 MR. TIERNEY: Right, right. But 35 percent --

14 MR. HABERTHUR: Oh.

15 MR. TIERNEY: Is that -- this is included in the 35
16 percent?

17 MR. HABERTHUR: No. So it's -- the 1,945- by 35 percent
18 reduced it to the 1.2 million.

19 MR. TIERNEY: The 1.2 million. So then what happens to
20 this?

21 MR. HABERTHUR: Well, I think the 35 percent was to
22 account for the City's fees.

23 MR. TIERNEY: That's what I'm asking.

24 MR. HABERTHUR: Yes.

25 MR. TIERNEY: That -- this number is included in the 35

1 percent?

2 MR. HABERTHUR: Yes.

3 MR. TIERNEY: Okay.

4 MR. HABERTHUR: Yes.

5 MR. TIERNEY: All right.

6 Sorry, Your Honor. I think I'm clear on it now.

7 THE COURT: So paragraph 6, I understand -- I had the same
8 issue, Mr. Tierney. Paragraph 6, I think, clarifies what he
9 was trying to do, which is to offset the attorneys' fees
10 that the plaintiff owes the City. And in large part, that's
11 why I reduced it by 35 percent. That was the biggest reason
12 for that. So therefore, the plaintiff is entitled to
13 recover from the City \$1,269,587.32. I will trust that you
14 did the math right.

15 And then, on line 13 of page 4, there's an offset of
16 costs.

17 MR. HABERTHUR: Yes, Your Honor. This -- starting with
18 the -- the City was requesting the 46,173.91, which I
19 understand included their expert fees and their costs.
20 Once --

21 THE COURT: And I whittled your costs down to 249,000 from
22 what you had originally --

23 MR. HABERTHUR: Yes.

24 THE COURT: -- requested by reducing Mr. Johnson's fee and
25 eliminating Mr. Hill's fee.

1 MR. HABERTHUR: That's correct, Your Honor. So put us at
2 249. And then I assume, just granting from there the cost
3 awards gave a net award of 202,986 to K&S, so it gave the
4 City the benefit of their full cost amount.

5 THE COURT: Right. I'm going to ask you both to sign
6 this. I'm going to sign it.

7 You only have to sign copy received, Mr. Tierney. You
8 don't have to sign anything else, but I want to make sure
9 there's a record of you receiving it.

10 So, Mr. Andersen, would you come up and sign it?

11 MR. ANDERSEN: Yes, Your Honor.

12 THE COURT: And give it to Mr. Tierney to have him sign it
13 as well, please. Thank you.

14 Mr. Andersen, I see that you went to the same school of
15 handwriting as many of the physicians I know.

16 MR. ANDERSEN: Always deniability.

17 THE COURT: But it's not plausible.

18 All right. Next is an order -- let's see. Oh. Findings
19 of fact and conclusions of law. Well, you've got it down to
20 17 pages.

21 MR. ANDERSEN: Can I be heard real quickly, Your Honor?

22 THE COURT: Sure.

23 MR. ANDERSEN: So two things that I did, was, yeah, I got
24 it -- you said between 30 and 35. In some ways I did
25 combine --

1 THE COURT: I saw.

2 MR. ANDERSEN: -- a couple. But here's -- I could take
3 more out, and I guess starting on page 8.

4 THE COURT: I'm not really sure I want you to, Counsel.

5 MR. ANDERSEN: Okay. The only things I thought I could
6 take out was I provided several examples of things that the
7 Kingens would not have been able to know until after they
8 did the Public Disclosures Act, and I see that that took up
9 several paragraphs. So I think it's important for the
10 statute of limitations, but I may have gone -- I may have
11 provided more examples than necessary, but -- so that was
12 the only place I think I could probably cut some more out,
13 if you wanted to.

14 THE COURT: No. Leave it in. I saw that and it -- but I
15 understand what you were trying to do.

16 MR. ANDERSEN: Great, Your Honor.

17 THE COURT: And when an appellate court looks at this,
18 they need to at least have a record before them as to what I
19 was thinking when the findings and order were entered,
20 because it's really important that they have the same
21 information before them that we have before us, and so I
22 don't have any problem with you being overinclusive. I just
23 thought that you were overboard on the first draft.

24 MR. ANDERSEN: I was. Thank you, Your Honor.

25 THE COURT: Mr. Tierney, any comments?

1 MR. TIERNEY: Well, I haven't -- honestly, Your Honor,
2 have not finished these.

3 THE COURT: There isn't anything really new on here. I
4 think they tried to synthesize and summarize some comments,
5 but it's basically a shorter version of what was previously
6 submitted.

7 There isn't anything new that I saw in here, Mr. Andersen.
8 Is there anything new that you presented?

9 MR. ANDERSEN: No. I adopted a few that Mr. Tierney had
10 submitted to you that were a little bit shorter. So I tried
11 to merge them as much as I could, including the \$12 million.
12 I'm kidding, Your Honor.

13 MR. TIERNEY: Well, maybe I'd just say we'll stand on what
14 we've already submitted on the comments on the first draft.

15 THE COURT: Thank you. I have signed the findings of
16 facts and conclusions.

17 MR. ANDERSEN: Are they -- is there a place for us to sign
18 on those?

19 THE COURT: There might be. I took the liberty of dating
20 your typed signatures on the judgment, counsel.

21 MR. HABERTHUR: Thank you, Your Honor.

22 THE COURT: I've signed the final judgment. Those numbers
23 are consistent with your findings of fact and conclusions of
24 law. I double-checked them myself.

25 MR. ANDERSEN: Thank you, Your Honor.

1 THE COURT: So, Counsel, good luck.

2 MR. ANDERSEN: Thank you very much.

3 THE COURT: I've never had a case quite like this. And
4 I've got to admit to you that I learned a lot. And I
5 appreciate the good lawyering on both sides, and I thank you
6 very much.

7 MR. ANDERSEN: Thank you, Your Honor.

8 MR. TIERNEY: Thank you, Your Honor.

9 THE COURT: I hope you will have a good day.

10 MALE SPEAKER: We want to tell you thank you. And your
11 staff, especially Lisa, was extremely patient.

12 MR. TIERNEY: Your Honor, one question here on the
13 judgment.

14 THE COURT: Yes, sir.

15 MR. TIERNEY: It's just an arithmetic question, and so
16 I'll just ask. Is this the net of what was awarded to K&S
17 minus what was awarded to the City? Because it looks like
18 it was the gross of what was awarded.

19 MR. ANDERSEN: Well, it could be.

20 THE COURT: Well, it says in the body -- if we go down and
21 look, it says that -- on page 2, on paragraph -- I'm sorry,
22 page 3 paragraph 2 top of the page it says that you
23 subtracted the amount of 257,000, but did you really is his
24 question.

25 MR. ANDERSEN: Your Honor, I think I missed that and

1 Mr. Tierney's right.

2 THE COURT: It says you did. I took you at your word.

3 MR. ANDERSEN: Well, it all adds up. I just didn't
4 subtract that one.

5 MR. TIERNEY: No, it didn't. According to this, it
6 didn't. Do you want this?

7 THE COURT: I don't think you did.

8 MR. ANDERSEN: I did not.

9 THE COURT: And I missed -- I'm sorry. I apologize to
10 Mr. Tierney and Mr. Taylor. I missed that also the first
11 time because I just read that top paragraph and assumed you
12 did what you said you did.

13 MR. ANDERSEN: Yes.

14 THE COURT: So perhaps your assistant could make a couple
15 of changes and --

16 MR. ANDERSEN: Yeah. So let's --

17 THE COURT: -- email us a new version. We're not going to
18 use that one.

19 MALE SPEAKER: So, Your Honor, are you saying
20 Mr. Haberthur messed up?

21 MR. HABERTHUR: It's not the first time.

22 MALE SPEAKER: Are there any of your third-year law
23 students that are looking for an associate's position?

24 THE COURT: There's one right behind you.

25 I think I'm going to do some math too and let's compare

1 numbers. And I think you have to recalculate the interest,
2 too, because I'm just going to give you the interest on the
3 net, not on the gross, so that means the 9.5 minus the
4 \$257,000. So the whole thing has to be recalculated.

5 MR. HABERTHUR: Okay. Your Honor --

6 THE COURT: I got \$9,332,469.72.

7 MR. HABERTHUR: Yes. That's what I have as well.

8 THE COURT: All right.

9 MR. HABERTHUR: And I believe the interest number
10 shouldn't change. Because if you do interest on the net,
11 that's giving the City interest from 2009 forward. So
12 wouldn't it be interest on the award to K&S, and then going
13 forward from today's date interest would be on that net
14 number? Did I explain that right?

15 THE COURT: Um-hum.

16 MR. HABERTHUR: I think it would be a pretty sizable
17 change.

18 THE COURT: Well, if we think this through, the City is
19 entitled to interest on their judgment because of the breach
20 of contract, but it seems to me that -- when does that -- so
21 when does that interest begin?

22 MR. HABERTHUR: I would argue it begins today because it
23 wasn't a liquidated amount. They wouldn't get prejudgment
24 interest on that. I mean, even in the complaint it argues
25 that amounts be proven at the time of trial.

1 THE COURT: Right.

2 MR. HABERTHUR: So I think it's got to be interest on the
3 City's amount -- well, the net amount beginning today going
4 forward.

5 THE COURT: Which reduces your principle upon which the
6 interest is calculated.

7 MR. HABERTHUR: Correct.

8 THE COURT: I agree. Make the change.

9 MR. HABERTHUR: Thank you, Your Honor.

10 THE COURT: So if you want to give her figures, I'll come
11 back on the bench in a couple of minutes and sign the final
12 version.

13 MR. HABERTHUR: Okay. Thank you, Your Honor.

14 THE COURT: Let Lisa know when you're ready.

15 MR. HABERTHUR: Yes.

16 THE COURT: Thank you.

17 THE CLERK: Please rise.

18 (Brief pause in proceedings)

19 THE COURT: I have signed the final judgment. The figures
20 appear to be consistent.

21 And I guess I would have to say congratulations to you.

22 MR. ANDERSEN: Thank you, Your Honor.

23 MR. HABERTHUR: Thank you.

24 THE COURT: To all three of you.

25 MR. HABERTHUR: Thank you, Your Honor.

1 THE COURT: I think that we had a fairly extraordinary
2 jury. They were willing to sacrifice greatly to be here
3 over some, you know -- over a difficult time, because it was
4 the holidays and then the first of the year and the
5 inclement weather and everything else, and yet they did
6 that, so --

7 MALE SPEAKER: I always wondered what happened to Juror
8 No. 15 that lost his job, but maybe you can't say it on the
9 record, but --

10 THE COURT: I don't know.

11 MALE SPEAKER: Okay.

12 THE COURT: I mean, if I knew I would probably say, but I
13 don't -- I don't have any idea.

14 MALE SPEAKER: That was unfortunate.

15 THE COURT: Yeah. He's a pretty talented guy. He was the
16 mortgage guy. And he's a pretty talented guy, so I would
17 think that he could find something that hopefully would be a
18 better job than the one that he lost.

19 MALE SPEAKER: I mean, it was just too bad where he
20 played -- the school that he played basketball for wasn't a
21 very good school, if I remember right.

22 THE COURT: Well, he's -- he was a big man. I suspect he
23 was quite a force underneath the basket, but...

24 So, counsel, I've signed this. Lisa has made copies and
25 you'll each get a copy. I sincerely wish everybody in this

1 room the best of luck, and I thank you very much for your
2 professionalism and for your hard work in this case.

3 MR. HABERTHUR: Thank you, Your Honor.

4 THE COURT: Good luck to everybody.

5 MR. HABERTHUR: Thank you.

6 (Hearing concluded)

C E R T I F I C A T E

STATE OF WASHINGTON

)

)

COUNTY OF KING

)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the audio and/or video files in the court format; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 11th day of July, 2016.

Shanna Barr, CETD